ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF THE UNITED STATES.[1]

COURT OF APPEALS OF MARYLAND.[2]

SUPREME COURT OF MICHIGAN.[3]

SUPREME COURT OF PENNSYLVANIA.[4]

ACKNOWLEDGMENT.

Regularity Presumed.—The regularity of an acknowledgment taken before a reputable acknowledging officer is presumed, and the burden of proof is with the party contesting an acknowledgment to show misconduct on the part of the officer, or forgery or other irregularity which he ought to have discovered: *Hourtienne* v. *Schnoor*, S. C. Mich.

ADMIRALTY.

Collision—Pilot.—In cases of collision, where there is a great conflict of testimony, the court must be governed chiefly by undeniable and leading facts, if such exist in the case. The court so governed in this case: *The Great Republic*, 23 Wall.

A pilot, when he is close to a vessel before him making movements which are not intelligible to him, ought not, in a case which is in the least critical, to be governed by his "impressions" of what the vessel is going to do. He should make and exchange signals, and ascertain positively her purposed movements and manœuvres: *Id.*

A steamer close to the right bank of a broad river—one, *ex. gr.*, a half a mile broad—which means to cross over and land on the left shore, is not bound, in the first instance, to give *three or more* whistles, which is the signal for landing It is enough that she give *two* whistles, which is the signal that she is going to the left. The three or more whistles may be given later: *Id.*

Constructions not favorable put on the testimony and manœuvres of a pilot who, it was proved, was "addicted to drinking when ashore," and who confessed to having been drinking on the day when his vessel left port, and within an hour of which time a collision occurred; though he swore that he had not taken any drink for six hours before his boat left its dock: *Id.*

Similar constructions put on the conduct of a captain whose watch it was, but who, instead of being engaged in a proper place in superintending the navigation of his vessel, was on the lower deck conversing with a passenger: *Id.*

A large and fast-sailing steamer is bound to act cautiously when overtaking and getting near to a small and slow one; and a collision having occurred between two steamers of this sort, a minor fault of the small and slow steamer was held not to make a case for division of damages

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[1] From J. W. Wallace, Esq., Reporter; to appear in vol. 23 of his Reports.

[2] From J. Shaaf Stockett, Esq., Reporter; to appear in 42 Maryland Rep.

[3] From Hoyt Post, Esq., Reporter, and Henry A. Chaney, Esq. Cases decided at January Term 1876. The volume in which they will be reported cannot yet be indicated.

[4] From P. Frazer Smith, Esq., Reporter; to appear in 78 Pa. State Reports.

where such fault bore but a little proportion to many faults of the large and fast one: *Id.*

When, in a case of collision, it appears that one of the vessels neglected the usual and proper measures of precaution, the burden is on her to show that the collision did not occur through her neglect: *Id.*

Negligence—Collision—Tug-boat for Assistance against Fire.—The owners of a vessel in flames towed by a tug and no longer in command of her own captain and crew, are not liable for injury done by her to another vessel, by the negligence of the captain of the tug; the said owners not having employed the tug, she being a tug whose regular business was the assistance of vessels in distress, and she having gone, of her own motion, to the extinguishment of the fire in this case: *The Clarita and The Clara*, 23 Wall.

A vessel anchored in the Hudson, opposite to the Hoboken wharves, if anchored three hundred and fifty yards from their river front, is anchored so far from shore that in case of a collision with a vessel towed in flames out of the Hoboken docks, no allegation can be made that she is anchored too near the shore: *Id.*

A vessel at anchor having an anchor-light and one man on deck, though not strictly an anchor-watch, is guilty of no fault in not being better lighted or watched: *Id.*

A vessel whose business it is to give relief to vessels on fire is bound to have chain hawsers or chain attachments on board; and if having only manilla hawsers, she is compelled to tow a vessel out of its dock with such a hawser, which is burnt, so that the vessel on fire gets loose from the tug, and, drifting, sets fire to another vessel, the tug is liable for the damages caused: *Id.*

The owners of a vessel who through their own carelessness (or that of their captain) set fire to another vessel, cannot claim salvage for putting that fire out: *Id.*

Agent.

Proof of Authority—Res gestæ.—In an action for goods sold, the plaintiff testified that defendant said, "if he concluded to take them he would have George come there and tell us so; give us the order." This was not proof that defendant had authorized George to act as his agent to buy the goods, nor justified the admission of the evidence of his statements: *Grim* v. *Bonnell*, 78 Penna.

An agent may prove his authority when by parol, but his declarations *in pais* are not proof of it: *Id.*

An agent's declarations may be evidence against his principal as part of the *res gestæ*, if made in conducting his agency, after his agency has established his authority to speak for his principal: *Id.*

George told plaintiff that defendant had concluded to take the goods, and gave plaintiff a memorandum to ship the goods to defendant, to whom George was indebted. Defendant testified that he had given no order for the goods. Evidence that at the time of the delivery of the goods to defendant he said he had bought them from George and gave him credit on his books for the price, was admissible: *Id.*

Declarations to become part of the *res gestæ*, must have been made at the time of the act done: *Id.*

ALLUVION.

What is—Boundary.—Where a survey begins "on the bank of a river" and is carried thence "to a point in the river," the river-bank being straight and running according to this line, the tract surveyed is bounded by the river. It is even more plainly so when it begins at a post "on the bank of the river, thence north five degrees east up the river and binding therewith:" *County of St. Clair* v. *Lovingston*, 23 Wallace.

Alluvion means an addition to riparian land, gradually and imperceptibly made, through causes either natural or artificial, by the water to which the land is contiguous: *Id.*

The test of what is gradual and imperceptible is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on: *Id.*

It matters not whether the addition be to streams which do overflow their banks or those that do not. In each case it is alluvion: *Id.*

APPLICATION OF PAYMENTS. See *Limitations.*

BANKRUPTCY.

Consent of Debtor to Judgment.—A judgment-debtor having purchased land before the lien had expired, agreed by amicable *scire facias* to revive the judgment so as to create a lien on the after-acquired land. Within four months he was declared bankrupt. *Held*, that the agreement was not in fraud of the bankrupt law: *Kemmerer* v. *Tool et al.*, 78 Penna.

The circumstance that a debtor consents to do what was for his own advantage would not affect the creditor with knowledge of insolvency, which from other facts he had no reasonable cause to believe: *Id.*

The bankrupt's real estate was sold by the sheriff, who paid the judgment-creditor in the revived judgment. *Held*, that the Court of Common Pleas had jurisdiction to entertain a suit by the assignees in bankruptcy for the recovery of the money so paid, if the judgment had been in fraud of the bankrupt law: *Id.*

Attachment—Construction of Sections 14, 35 *and* 39 *of the Bankrupt Act of* 1867.—The failure of the defendant to appear and defend an attachment against his property, is no evidence of his having done any act to *procure* the attachment within the meaning of section 35 of the Bankrupt Act of 1867, or to *procure* or *suffer* his property to be taken under legal process within the meaning of section 39 of said act: *Henkelman and others* v. *Smith, Assignee*, 42 Md.

Section 14 of the Bankrupt Act refers, and can only refer, to attachments which are pending at the time the petition in bankruptcy is filed, and not to such as have been prosecuted to a judgment prior to the filing of such petition: *Id.*

The attachment having been properly issued and prosecuted to judgment, that judgment is final, imports absolute verity, is conclusive with respect to the subject-matter adjudicated, and cannot be re-examined or impeached in a collateral proceeding: *Id.*

BILLS AND NOTES.

Forged Draft—Recovery from prior Endorser.—An Indiana bank

drew on a Philadelphia bank in favor of the cashier of a New York bank; the draft was stolen, the name of the cashier (payee) forged as endorser and passed to defendants, October 16th, in payment of goods sold to the holder, they giving to him a check on the Philadelphia bank for the difference, which was drawn, and the draft, endorsed by the defendants, was deposited to their credit in the same bank. After learning of the fraud, on November 2d the bank demanded payment of the draft from defendants. *Held*, that the demand was in time: *Chambers et al.* v. *Union National Bank*, 78 Penna.

Under Act of April 5th 1849, the amount of the draft could be recovered back from the defendants: *Id.*

The holder of a draft which is endorsed and passed by him, guaranties the prior endorsements: *Id.*

BOUNDARY. See *Alluvion.*

CAPTURED AND ABANDONED PROPERTY.

Factor not Owner.—Under the Abandoned and Captured Property Act, which gives to "the owner" of any such property a right, after it has been sold by the government, to recover the proceeds of it in the Treasury of the United States, a factor who has merely made advances on the property—there being another person who has the legal interest in the proceeds—is not to be regarded as "the owner;" at least not to be so regarded beyond the extent of his lien: *United States* v. *Villalonga*, 23 Wallace.

CHATTEL MORTGAGE. See *Debtor and Creditor; Replevin.*

COLLISION. See *Admiralty.*

CONFLICT OF LAWS. See *Husband and Wife; Intoxicating Liquors.*

CONTRACT.

In Restraint of Trade—Equity—Damages.—A mother sold her place of business and contracted that "she will not engage in the same business, directly or indirectly," in the Twenty-second Ward, within ten years, but would by her counsel promote the business of the purchaser; she bought a lot and put up buildings suitable for the business for her son; she *advanced* money to him for carrying on, as she had done to other children in their business. The master found that the business was really that of the son and not that of the defendant, was carried on by him on his own credit and means, and not by her. There was no evidence of injury to the purchaser. Under a bill to restrain her from aiding in the business, permitting the premises to be used for the business, or selling the property to be used for the business: *Held*, under the circumstances an injunction should not be decreed: *Harkinson's Appeal*, 78 Penna.

Agreements in restraint of trade generally are void; to be valid they must be limited in time or partial in their operation and supported by a sufficient consideration: *Id.*

That a court of equity may enjoin against the free exercise of a trade, the violation of the agreement should not be doubtful: *Id.*

Certainty is an essential element in the contract whose enforcement is sought by an injunction, and some appreciable damage should be shown: *Id.*

When damages will compensate the benefit derived or the loss suffered, equity will not interfere by injunction: *Id.*

CRIMINAL LAW.

Murder—Evidence—Degree.—On a trial for murder it was competent to give evidence, for the purpose of showing motive, that the prisoner and the deceased both visited the same woman; that just after the homicide the prisoner said he had warned deceased not to visit her, she would prove a curse to any man, and now it had come to pass: *McCue* v. *Commonwealth*, 78 Penna.

Unless the Commonwealth shows "ingredients" of murder in the first degree, no presumption arises from the killing that the offence is higher than murder in the second degree: *Id.*

If the evidence shows that from which it may be reasonably concluded that the murder was wilful, deliberate and premeditated, it is for the jury to pronounce the degree, and the power of the Supreme Court, under the Act of February 15th 1870, to determine whether ingredients of murder in the first degree existed, ceases: *Id.*

If the killing was not accidental, malice and a design to kill are to be presumed from the use of a deadly weapon, the law adopting the rational belief that a man intends the usual, immediate and natural consequences of his voluntary act: *Id.*

Where upon a conviction of murder in the first degree the record does not show that before sentence the prisoner was asked if he had anything to say why sentence should not be pronounced, it is error, and the sentence will be reversed and the record remitted, that he may be sentenced afresh: *Id.*

DAMAGES. See *Trover.*

DEBTOR AND CREDITOR. See *Equity.*

Chattel Mortgage—Time of Payment—Premature Seizure by Mortgagee.—A mortgagee of chattels who had expressly fixed a certain time and place for the payment of the mortgage, the time being a few days later than the date of the maturity of the debt, made himself a wrongdoer by seizing the chattels on the day before the day he had fixed for payment; payment on that day would have been a satisfaction of the debt: *Baxter* v. *Spencer*, S. C. Mich.

DEED. See *Acknowledgment.*

DIVORCE. See *Husband and Wife.*

EQUITY. See *Contract; Municipal Corporation.*

Debtor and Creditor—Jurisdiction in Equity—Parties—Multifariousness.—A creditor who has exhausted his remedy at law by a fruitless execution on his judgment, has the right to ask the aid of a court of equity to discover and reach the equitable assets of his debtor, including property purchased by the debtor in the name of another, and to have fraudulent conveyances standing in his way and covering up the property set aside and vacated. Jurisdiction in equity to grant such relief is clear, and established by abundant authority: *Trego et al.* v. *Skinner*, 42 Md.

In such a proceeding, where part of the property pursued has been mortgaged, but no relief is sought against the mortgagee, whose mortgage is not assailed, and whose title under it is conceded to be valid, such mortgagee is not a necessary party to the proceeding: *Id.*

Where the object of the bill is to obtain satisfaction of the complainants' judgments out of the assets and property of their debtor, which they allege he has fraudulently concealed and conveyed to different parties, the several persons to whom he has thus conveyed distinct parcels of his property, real and personal, for the same fraudulent purpose, may be joined with the debtor in the bill, though such persons may have no common interest in the several parcels so conveyed, and no joint fraud in any one transaction be charged against all of them: *Id.*

Estoppel.

Repudiation of Contract—Pleading.—One who has repudiated a contract is estopped from afterward claiming the benefit of it for the purpose of turning the other party out of court on the ground that the latter should have sued him on the alleged contract, instead of under the common counts: *McQueen* v. *Gamble*, S. C. Mich.

Evidence. See *Agent.*

Shop books—Testimony of Parties under Act of 1869.—Prior to the Act of April 15th 1869 (Witnesses) books of original entry were the evidence, the oath of the party was supplementary. Since, the party is a competent witness and may prove his claim as a stranger would have done before: *Nichols et al.* v. *Haynes*, 78 Penna.

Lumping charges in a book would not stand as evidence, but the testimony of the party that the entry was composed of items known to him to have been furnished would be competent to go to the jury: *Id.*

The party's knowledge that the sum was correct would make it evidence; the credibility as to it would be for the jury: *Id.*

Gift.

Delivery must be according to Nature of Article—Husband and Wife.—To perfect a gift, the delivery must be according to the nature of the thing—an actual delivery, so far as the subject is capable of it, must be the true and effectual way of obtaining the command and dominion of the subject; *Bond* v. *Bunting*, 78 Penna.

If the thing be not capable of actual delivery, there must be some act equivalent to it; the owner must part both with the possession and dominion of the property: *Id.*

If the thing be a chose in action, an assignment or some equivalent instrument must be actually executed: *Id.*

Wherever a party has power to do a thing, and means to do it, the instrument he employs shall be so construed as to give effect to his intention: *Id.*

The provisions of the Married Woman's Act, April 11th 1848, are confined to powers given to her husband to sell and dispose of her real and personal property. A wife may assign her choses in action, her husband joining, without acknowledgment of any kind: *Id.*

GUARANTY.

Liability of Guarantor—Pleading—General Demurrer—Sufficiency of a Declaration.—The obligation of one signing and sealing a guaranty, which it was intended should be signed by him alone, is not impaired by the fact that the guaranty concluded "in witness whereof *we* have hereunto set *our hands* and affixed *our seal:*" *Mitchell v. McCleary*, 42 Md.

In an action by the lessor of certain premises against a guarantor on his guaranty in writing that the lessee of said premises should pay the rent and comply with all his obligations in the lease, the declaration averred that "the defendant did on the day of the execution of said lease and *as part thereof*, and prior to, and as a condition precedent to the making of said lease and to the delivery of said property, guarantee in writing unto the said plaintiff in manner and form as follows;" and then followed the guaranty *ipsissimis verbis*. The declaration also repeatedly averred that the guaranty was a part and parcel of the consideration for the lease; that the lease was made on the faith of it, and that the premises were delivered, and the lessee took possession of them under and subject to said lease and guaranty. On a general demurrer to the declaration, it was *Held*: 1. That the declaration was sufficient; 2. That the guaranty being absolute, and not a mere overture or offer to guarantee, notice of its acceptance was not required to make the guarantor liable thereon: *Id.*

HUSBAND AND WIFE. See *Gift; Replevin.*

Choses in Action—Liability of the Estate of a Husband for a Debt contracted by him in favor of his Wife, as against the Claims of subsequent Creditors.—A married woman being entitled to a distributive share of the proceeds of the real estate of her father, sold under proceedings for a partition, sold her share with the consent of her husband, and took the note of the purchaser for the purchase-money. This note the husband collected as a loan by his wife to him upon an agreement with her, to repay it to her with interest, and gave her his note for the amount due her. Afterwards, the husband becoming embarrassed, in order to protect his wife's claim paid two judgments against himself and caused them to be entered to her use. The validity of this transaction being impeached by subsequent creditors of the husband as in fraud of them, it was *Held*, 1st, That the husband did not reduce the *chose in action* of his wife into his possession by virtue of his marital rights, but in pursuance of his agreement with his wife obtained control of the note; and his agreement to repay her the amount he collected on it was founded upon an adequate consideration; 2d, That the claim of the wife was manifestly just and should be allowed: *Drury* v. *Briscoe*, 42 Md.

Marriage—Proof of—Declarations—Reputation—Statute—Extra-Territorial Effect.—Where an illicit connection has once existed, it is incumbent upon those who set up subsequent marriage between the parties, to show when and where it occurred; and having undertaken to prove that a valid marriage was celebrated at a particular time and place, the parties cannot be permitted, if the evidence should be insufficient to establish such marriage, to rely upon other facts and circumstances as the ground of presumption that a marriage *may* have taken place between

the parties at some other and different time and place from that testified to by the witness; the presumption in such case being that the connection between the parties continued to be illicit, until that presumption is overcome by distinct proof of marriage: *Barnum* v. *Barnum et al.*, 42 Md.

Marriage may be proved in civil cases, other than actions for seduction, by reputation, declarations and conduct of the parties; but when reputation is relied on, that reputation, to raise the presumption of marriage, must be founded on general, not divided or singular opinion; and where reputation in such case is divided it amounts to no evidence at all. And so with respect to the declarations of the parties; the value of such declarations as evidence will always depend upon the circumstances under which they were made: *Id.*

The declarations of a mother as to the marriage of her son, are admissible after her death, to show that one who claimed and was admitted to be his son, was illegitimate: *Id.*

General repute in a family, proved by surviving members of it, is admissible upon a question of marriage: *Id.*

Upon a question of legitimacy the declarations of a father that his son was illegitimate are competent evidence: *Id.*

The act of a state legislature declaring that A. was thereby constituted a legal *heir* of B. confers no capacity upon A. to acquire property beyond the state passing the act: *Id.*

Divorce.—A decree *pro confesso* cannot be made upon a libel in divorce. If either party does not attend, the court must decide on testimony taken *ex parte*: *Kilborn* v. *Field et ux.*, 78 Penna.

A contract between husband and wife, pending proceedings in divorce, to pay her a sum of money, the consideration of which was, in whole or in part, that she would not oppose the divorce, is void: *Id.*

Insurance.

Life-policy—Completion of Contract.—A., of San Francisco, aged twenty-six, applied, on the 5th of June 1867, to the agent there of a New York life insurance company to insure his life, the money to be payable "at forty-five or death," and the policy to take effect from the date of the application. The agent acknowledged the receipt of $99.30 as the first quarterly premium, with a proviso that "said application shall be accepted by the company; but should the same be declined or rejected by said company, then the full amount paid by A. will be returned to the applicant on the production of this receipt." In fact, A. did not pay any money at this time, but only gave a promissory note for the $99.30, which note he never, at any time, paid:

Upon the trial, the court below (to which the case was submitted without the intervention of a jury, under the Act of March 3d 1865, which enacts that the court may, by agreement of parties, find the facts, and that the finding shall have "the same effect as the finding of a jury,") found, as a fact, that the company "accepted" the application and sent a policy to its agent; "but that the policy did not in terms agree with the memorandum as to date and time of payment." The policy sent made the quarterly payment $96.60 (a difference in A's favor), and the policy was antedated so as to run from the 5th day of

April 1867—a day which the policy showed was the applicant's birthday. This variation was, of course, against his interest. Accompanying the policy sent to the agent were two receipts for premiums, executed by the company in New York, one as of the 5th of April 1867, and the other as of the 5th of July 1867, under which receipt was a "Notice to policy-holders," that unless premiums were paid on or before the day they became due, the policy was forfeited and void; that agents were not authorized to make, alter, or discharge contracts, or waive forfeitures; that payments of premiums to agents were not valid unless receipts were given, signed in New York by the officers of the company, the local agents to countersign them as evidence of payment; and that all premiums were payable in New York. The policy and these receipts reached the agent at San Francisco on the 2d of August, having been executed in New York, probably twenty-three to thirty days before. The agent countersigned them, and on the 8th (six days after receiving it) wrote to A., then absent from home, informing him that his policy had arrived, and asking whether he would have it sent to him or held subject to his order. It did not appear whether A. received or did not receive the letter. On the 21st of August he was shot (becoming at once insensible), and died on the 20th of September. *Held*, that owing to the change of terms in the policy from those contemplated by A., the applicant, the acceptance by the company was a qualified acceptance which A. was not bound to accept; that there having been no evidence that he did accept it, the company was not bound: *Insurance Co.* v. *Young's Administrator*, 23 Wall.

Intoxicating Liquors.

Contract by Foreign Vendor.—The agent of a foreign liquor-selling establishment obtains an order which he sends to his employers for approval. *Held*, that there is no completed contract until the order is approved and accepted, and that if that is done outside of the state, it is a foreign contract, and not void as in violation of the liquor law of Michigan: *Kling* v. *Fries*, S. C. Mich.

Illegality and bad faith are not to be presumed against a foreign contract, but must be shown: *Id.*

Landlord and Tenant.

Constructive Eviction—Implied Obligation on the part of a Landlord.—N. leased to G. certain property to be used as a distillery, at $125 a month, payable monthly. As a preliminary to the use of the distillery, it was necessary for the lessee to file with the United State collector the written consent of the lessor as the owner in fee of the property, in accordance with sect. 3262 of title XXXV of the Revised Statutes of the United States, unless the commissioner authorized the collector to accept the bond of the lessee in lieu of such written consent. The lessor refused to give such written consent, and in consequence thereof the lessee was prevented from running the distillery and the property remained idle. In an action by the lessor to recover the rent of the premises, it was *Held*, 1st. That the refusal of the lessor to give his written consent to the lessee, as required by law, to enable him to carry on the business for which the premises were leased, discharged the lessee from all obligation to pay the rent—the default of the lessor in this par-

ticular amounting to "constructive eviction," so far as the legitimate employment of the property was concerned. 2d. That the obligation of the lessor to give his consent, as required by the law, was to be implied as a necessary incident to the lease, as fully as if there had been inserted a positive stipulation to that effect: *Grabenhorst* v. *Nicodemus*, 42 Md.

Lease.

Joint Occupancy—Claim for Rent not Assignable as between mere Joint Occupiers.—Under an agreement for the mere joint occupancy of premises and joint-conduct of business, there can be no claim for rent assignable by one of the parties as against the other. The remedy for a breach of the contract would be an action for damages, and not one for use and occupation: *Carver* v. *Palmer*, S. C. Mich.

Limitations, Statute of.

Application of Payments.—Kiff gave Moore ten notes, one payable each consecutive year without interest; judgment was entered on them; at the same time ten plain notes were given for the interest, payable yearly. Kiff made payments to Moore from time to time; neither party made any appropriation of these payments to either debt. More than six years after the interest-notes were due, in a *scire facias* on the judgment, the court charged, "as the interest-notes are now barred by the statute, these payments must be applied to the debt in controversy." *Held* to be error: *Moore* v. *Kiff et al.*, 78 Penna.

Malicious Prosecution.

Evidence—Province of Court and Jury—When Court not required, ex mero motu, to define Malice.—In an action for a malicious prosecution, the plaintiff offered to prove that pursuant to the regular custom of the detective police department, his name was entered upon the detective police annals of the city of Baltimore, and open to the inspection and use of the police force, as tending to show the publicity of the charge made against him and the consequent injury to him. *Held*, that this was clearly not admissible evidence against the defendant, unless there was some law requiring such a record to be kept, or unless the plaintiff was prepared to show by proof that the defendant knew that the name of the plaintiff would be so entered as the consequence of the charge of theft brought against him: *Garvey* v. *Wayson*, 42 Md.

A prayer which asks the court to instruct the jury that malice "in its legal sense, is any wrongful act done intentionally without *legal justification or excuse*," is erroneous: 1st. Because malice is not *an act* but the *wrongful motive* that prompts the act. 2d. Because what constitutes a legal justification or excuse is matter of law to be determined by the court, and no prayer should be granted which submits such a question to the jury: *Id.*

Where a prayer groups together various facts and asks the court to instruct the jury that they may consider said facts, if found by them, in determining whether or not the defendant was actuated by malice, and several of the facts so enumerated, even if found by the jury, would not be evidence of malice, such prayer should be rejected: *Id.*

In an action for a malicious prosecution upon a charge of theft, the voluntary attendance of the defendant upon the execution of the search-

warrant and his entrance into the plaintiff's house while the search was being made, is no evidence of malice on his part: *Id.*

Where the court has rejected a prayer defining malice because it was incorrect, it is not bound *ex mero moto* to give any definition of it: *Id.*

MORTGAGE.

Taking Second Mortgage for same Debt.—Where a mortgage was given to a guardian to secure a debt due his wards, and subsequently a new guardian was appointed in his place, who, in ignorance of the existence of subsequent encumbrances upon the property, agreed that the time of payment of the mortgage-debt should be extended, and took a new mortgage on the same property to secure its payment, but without releasing the first mortgage, it was *Held*, that the debt secured by the two mortgages was the same and should have the benefit of the lien of the first mortgage: *Drury et ux.* v. *Briscoe*, 42 Md.

MUNICIPAL CORPORATION.

Jurisdiction in Equity—Violation of Ordinance—Nuisance.—Courts of chancery have no jurisdiction to restrain the threatened violation of a municipal ordinance unless the act amounts to a nuisance: *Village of St. Johns* v. *McFarlan*, S. C. Mich.

The erection of a wooden building within municipal fire-limits is not of itself a nuisance, nor does the fact that it is prohibited by an ordinance make it so: *Id.*

NEGLIGENCE. See *Admiralty.*

Railroad Whistle—When Negligence, is for the Court.—Negligence is the absence of care, according to the circumstances: *Philadelphia, Wilmington and Baltimore Railroad Co.* v. *Stinger*, 78 Penna.

It is the duty of an engineer approaching a highway, if danger is to be apprehended, to give warning by sounding the whistle, or other sufficient alarm; the failure to do so is negligence *per se*, to be determined by the court: *Id.*

The court is to decide the question of negligence, where the precise duty is determinate and the same under all circumstances: *Id.*

A wanton, unnecessary sounding of the whistle is negligence: *Id.*

A railroad company having a chartered right to propel their cars by steam, are not responsible for injuries resulting from the proper use of such agency: *Id.*

Whether alarming a horse and causing an accident by a rapidly-moving train, or sounding a whistle, will make the company liable for damages, depends upon whether it was from want of proper care in those in charge of the train: *Id.*

What would be due care in running a train through a sparsely settled rural district might be negligence in approaching a large city: *Id.*

A train was passing through a city on a railroad which had a number of short curves, so that persons could see the train but for a short distance; it was crossed by several streets and passed over a river on a drawbridge; the rule of the company required that the whistle should be sounded about a certain point, to warn the bridge-tender and persons

about to cross at other streets. *Held*, the use of the whistle at that point in the ordinary manner was not negligence: *Id.*

If the whistle had not been sounded at such point and one had been injured by reason of the omission, it would have been negligence *per se*: *Id.*

One driving an unbroken or vicious horse, or one easily frightened by a locomotive, along a public road running side by side with a railroad, does so at his own peril; the right of the company to move their trains on their road is as high as that of the individual to use the public road: *Id.*

NUISANCE. See *Municipal Corporation.*

PLEADING. See *Estoppel.*

RAILROAD. See *Negligence.*

REPLEVIN.

Prior Demand—Chattel Mortgage—Husband and Wife—Evidence.—A husband gave a chattel mortgage upon a span of horses in use on his wife's farm, and absconded. The mortgagee, without making any demand for them, replevied them for breach of the condition of the mortgage. *Held*, that the mere presence of the horses on the farm did not make the wife a wrongdoer, and that the mortgagee was at least bound to present his claim to her, to be recognised or rejected, before he could lawfully subject her to the costs of a suit: *Campbell* v. *Quackenbush*, S. C. Mich.

In replevin brought against a wife upon a liability incurred by her husband, who had absconded, testimony of what the husband had said and done was inadmissible, unless the acts or statements had been in her presence or with her knowledge: *Id.*

SURETY. See *Trover.*

TROVER.

Surety—Effect of Recovery in Trover on Title to Goods—Joint Conversion—Damages.—The relation of suretyship is based on the consent of all the parties: *Kenyon* v. *Woodruff*, S. C. Mich.

A recovery for conversion terminates the right to reclaim the property converted: *Id.*

Where parties are jointly guilty of conversion, and judgment has been recovered against one of them therefor, the injured party, by proceeding to enforce collection against him under that judgment, elects to look to him alone and bars himself from having recourse to the rest: *Id.*

A deputy sheriff was deceived by certain persons into converting property for their benefit. Judgment was recovered against him for the conversion, and he, in turn, sueing them in tort for the damage caused him by their fraud, recovered the amount of the judgment obtained against himself. This was held a proper measure of damage: *Id.*